

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Plaintiff,

vs.

ROBERT MIELL,

Defendant.

No. C04-0142

**FINAL JURY INSTRUCTIONS**

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ROBERT MIELL,

Third-Party Plaintiff,

vs.

BRETT THROLSON and  
BRETT THROLSON AGENCY, INC.,

Third-Party Defendants.

**FINAL INSTRUCTION NO. 1**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now, as well as those I gave you earlier, are in writing and will be available to you in the jury room. I emphasize, however, that this

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**FINAL INSTRUCTION NO. 1 (Cont'd)**

does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

**FINAL INSTRUCTION NO. 2**

The fact that American Family Mutual Insurance Company and Brett Throlson Agency, Inc. are corporations should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

**FINAL INSTRUCTION NO. 3**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

**FINAL INSTRUCTION NO. 4**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claims rely upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

In some instances, you will be instructed that a fact must be proven by "clear, convincing, and satisfactory" evidence. Evidence is clear, convincing, and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

The greater weight or preponderance of the evidence, or whether a fact has been proven by clear and convincing evidence, is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

**FINAL INSTRUCTION NO. 5**

**American Family's Claim for Breach of Contract**

Regarding its claim for breach of contract, American Family must prove, by the greater weight or preponderance of the evidence, all of the following propositions:

1. The existence of a contract.
2. The terms of the contract.
3. Miell has breached the contract.
4. The amount of any damage Miell has caused.

If American Family has failed to prove any of these propositions, then American Family cannot recover damages on this claim. If American Family has proved all of these propositions, then American Family is entitled to recover damages from Miell in some amount.

**FINAL INSTRUCTION NO. 6**

**Regarding element No. 1 of Instruction No. 5**, you are instructed that this element has been established as a matter of law.

**Regarding element No. 2 of Instruction No. 5**, in determining the terms of the contract you may consider the following:

- a. The intent of the parties along with a reasonable application of the surrounding circumstances.
- b. The intent expressed in the language used prevails over any secret intention of either party.
- c. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
- d. You must attempt to give meaning to all language of a contract. Because an agreement is to be interpreted as a whole, assume that all of the language is necessary. An interpretation which gives a reasonable, effective meaning to all terms is preferred to an interpretation which leaves a part of the contract unreasonable or meaningless.
- e. The meaning of a contract is the interpretation a reasonable person would give it if they were acquainted with the circumstances both before and at the time the contract was made.
- f. Ambiguous language in a written contract is interpreted against the party who selected it.
- g. Where general and specific terms in the contract refer to the same subject, the specific terms control.

**Regarding element No. 3 of Instruction No. 5**, you are instructed that this element has been established as a matter of law.

**Regarding element No. 4 of Instruction No. 5**, the measure of damage is the amount of all payments made by American Family under the policies after May 10, 2001,

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**FINAL INSTRUCTION NO. 6 (Cont'd)**

reduced by the amount of any premium paid by Miell for the policies for the period after May 10, 2001.



**FINAL INSTRUCTION NO. 7**

**American Family's Claim for Fraudulent Misrepresentation**

Regarding its claim for fraudulent misrepresentation, American Family must prove, by a preponderance of clear, satisfactory, and convincing evidence, the following propositions.

1. During a period of time between December 2001 and December 2002, Miell made representations to American Family that:

- a. He had actually repaired or replaced certain roofs which were insured by American Family and which were damaged in the May 10, 2001 hail storm;
- b. Contractors in the Cedar Rapids, Iowa, area had repaired or replaced those roofs for Robert Miell;
- c. Robert Miell had paid particular amounts to those contractors through checks.

2. One or more of the representations was false.
3. The representation was material.
4. Miell knew the representation was false.
5. Miell intended to deceive American Family.
6. American Family acted in reliance on the truth of the representation and was justified in relying on the representation.

7. The representation was a proximate cause of American Family's damage.

8. The amount of damage.

If American Family has failed to prove any of these propositions, then American Family cannot recover damages on this claim. If American Family has proved all of these propositions, then American Family is entitled to recover damages from Miell in some amount.

**FINAL INSTRUCTION NO. 8**

**Regarding element No. 1 of Instruction No. 7,** "a representation" is any word or conduct asserting the existence of a fact. It may include silence if the defendant fails to disclose information which the defendant has a duty to disclose and which the plaintiff has reason to believe will be disclosed.

**Regarding element No. 3 of Instruction No. 7,** a representation is "material" if:

- a. A reasonable person would consider it as important in making a decision.
- b. Miell knows or has reason to know that American Family considers, or is likely to consider, the representation as important in making a decision.
- c. The representation influences a person to enter into a transaction which would not have occurred otherwise.

**Regarding element No. 4 of Instruction No. 7,** Miell knew the representation was false if any of the following situations existed:

- a. Miell actually knew or believed the representation was false.
- b. Miell made the representation without belief in its truth or in reckless disregard of whether it was true or false.
- c. Miell falsely stated or implied that the representation was based on his personal knowledge or investigation.
- d. Miell made a representation which he knew or believed was materially misleading because it left out unfavorable information.
- e. Miell stated his intention to do or not to do something when he did not actually have that intention.
- f. Miell knew the representation could be understood in both a true and false manner, and made the representation (i) intending that it be understood in the false sense,

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**FINAL INSTRUCTION NO. 8 (Cont'd)**

(ii) having no belief as to how it would be understood, or (iii) in reckless disregard of how it would be understood.

**Regarding element No. 5 of Instruction No. 7**, Miell intended to deceive the plaintiff if any of the following situations existed when he made a representation:

a. Miell wanted to deceive American Family or believed that American Family would in all likelihood be deceived.

b. Miell had information from which a reasonable person would conclude that American Family would be deceived.

c. Miell made the representation without concern for the truth.

**Regarding element No. 6 of Instruction No. 7**, American Family must rely on the representation and the reliance must be justified. It is not necessary that the representation be the only reason for American Family's action. It is enough if the representation was a substantial factor in bringing about the action. Whether reliance is justified depends on what American Family can reasonably be expected to do in light of their own information and intelligence. Reliance is not justified if the representation is of an unimportant fact or is obviously false.

**Regarding element No. 7 of Instruction No. 7**, the conduct of a party is a proximate cause of damages when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause. A particular result may have more than one proximate cause.

**Regarding element No. 8 of Instruction No. 7**, the measure of damage is the amount of all payments made by American Family in reliance on the false representations. You should not reduce the damages by the amount of any premiums paid by Miell, nor should you reduce the damages by the amounts which Miell paid for repairs after the replacement checks were received.

**FINAL INSTRUCTION NO. 9**

In addition to compensatory damages, American Family also claims entitlement to "punitive damages." An intentional breach of contract or fraudulent misrepresentation does not by itself give rise to an award of punitive damages. Punitive damages may be awarded if American Family has proven by a preponderance of clear, convincing, and satisfactory evidence that Miell's conduct constituted willful and wanton disregard for the rights of another and caused actual damage to American Family.

Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

Punitive damages are not intended to compensate for loss but are allowed to punish and discourage Miell and others from like conduct in the future. You may award punitive damages only if Miell's conduct warrants a penalty in addition to the amount you award to compensate for American Family's actual losses.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all of the evidence, including:

1. The nature of Miell's conduct that harmed American Family.
2. The amount of punitive damages which will punish and discourage like conduct by Miell. You may consider Miell's financial condition or ability to pay. You may not, however, award punitive damages solely because of Miell's wealth or ability to pay.
3. American Family's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to American Family.

**FINAL INSTRUCTION NO. 10**

**Miell's Claim for Negligence Against Throlson**

Regarding his claim for negligence against Throlson, Miell must prove, by the greater weight or preponderance of the evidence, all of the following propositions:

1. Throlson was negligent in failing to comply with Miell's request to make sure his vehicles were covered by the BOPPs policies or the commercial excess liability policy.
2. The negligence was a proximate cause of damage to Miell.
3. The amount of damage.

If Miell has failed to prove any of these propositions, then he is not entitled to damages. If Miell has proved all of these propositions, you will then consider the defense of comparative fault, as explained in Instruction No. 11.

The issue of whether Throlson gave appropriate advice to Miell regarding excess liability insurance coverage is not before you in this lawsuit. Rather, the issue is whether Miell instructed Throlson to make sure his vehicles were covered under the BOPPs policies or the excess liability policy, and Throlson negligently failed to do so.

**FINAL INSTRUCTION NO. 11**

Throlson claims that Miell was negligent in failing to make sure that he had the liability insurance coverage which he believed was necessary. In order to establish this defense, Throlson must prove, by the greater weight or preponderance of the evidence, all of the following propositions:

1. Miell was negligent in failing to make sure that he had the insurance coverage which he believed was necessary.

2. Miell's negligence was a proximate cause of his damage.

If Throlson has failed to prove either of these propositions, then he has not proved his defense. If Throlson has proved both of these propositions, then you will assign a percentage of fault against Miell and include Miell's fault in the total percentage of fault found by you in answering the special verdicts.

**FINAL INSTRUCTION NO. 12**

**Regarding element No. 1 of Instruction Nos. 10 and 11,** “negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

An insurance agent must use a degree of skill, care and learning ordinarily possessed and exercised by other insurance agents in similar circumstances.

**Regarding element No. 2 of Instruction Nos. 10 and 11,** the conduct of a party is a proximate cause of damages when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. “Substantial” means the party’s conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause. A particular result may have more than one proximate cause.

**Regarding element No. 3 of Instruction No. 10,** the measure of damages is the difference between the amount of liability insurance coverage tendered by American Family for the motor vehicle accident and the amount which Miell reasonably paid to settle the lawsuit arising out of the motor vehicle accident.

**FINAL INSTRUCTION NO. 13**

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Miell and Throlson, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages. Brett Throlson and Brett Throlson Agency, Inc. are to be treated as a single party for the purpose of determining their percentage of fault.

After you have compared the conduct of all parties, if you find Miell was at fault and his fault was more than fifty percent (50%) of the total fault, then Miell cannot recover damages. However, if you find Miell's fault was fifty percent (50%) or less of the total fault, then I will reduce the total damages by the percentage of Miell's fault.



**FINAL INSTRUCTION NO. 14**

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.


*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

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**FINAL INSTRUCTION NO. 14 (Cont'd)**

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

DATED this 14<sup>th</sup> day of January, 2008.

  
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JON STUART SCOLES  
United States Magistrate Judge  
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT  
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AMERICAN FAMILY MUTUAL  
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ROBERT MIELL,

Third-Party Plaintiff,

vs.

BRETT THROLSON and  
BRETT THROLSON AGENCY, INC.,

Third-Party Defendants.

No. C04-0142

**SEPARATION INSTRUCTION**

Ladies and Gentlemen:

You are further instructed that if you have not reached a verdict by 5:00 p.m. on this date, then you should separate and return at 9:00 a.m. tomorrow morning to resume your deliberations. If you unanimously agree, however, then you may continue working past 5:00 p.m. If you have not reached a verdict by 6:00 p.m., then dinner will be delivered to you by the Court Security Officer. If you still have not reached a verdict by 9:00 p.m., then you are instructed to separate and return tomorrow morning at 9:00 a.m. to resume your deliberations.

**SEPARATION INSTRUCTION (Cont'd)**

If you separate and return tomorrow morning for additional deliberation, then you are directed to follow the Separation Instruction previously given. That is, you must not discuss this case with anyone, including family members, until after the Jury's verdict has been received by the Court. If there should be any newspaper, radio, or television accounts of the progress of this trial, you are forbidden by law to read, listen, or watch them.

DATED this 14th day of January, 2008.



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JON STUART SCOLES  
United States Magistrate Judge  
NORTHERN DISTRICT OF IOWA